United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2615

United States Court of Appeals

SECOND CIRCUIT

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Plaintiffs-Appellants,

—against—

ARROW ELECTRONICS, INC.,

Defendant-Appellee,

—and—

STATE OF NEW YORK,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

SAMUEL M. SPRAFKIN
230 Park Avenue
New York, N. Y. 10017
Attorney for Plaintiffs-Appellants

SAMUEL M. SPRAFKIN
MANDEL M. EINHORN
of Counsel

3

TABLE OF CONTENTS

PAGE

Cases Cited:

United States Court of Appeals

SECOND CIRCUIT

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Plaintiffs-Appellants,

—against—

ARROW ELECTRONICS, INC.,

Defendant-Appellee,

—and—

STATE OF NEW YORK,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Preliminary Statement

Defendant's original motion in the District Court was for summary judgment under Rule 56 upon the ground that the action was barred by *res judicata* (19a). The District Court did not consider this motion (181a). Apparently

aggrieved by this but unable to appeal therefrom, defendant now seeks to present this defense. It, in effect, argues that the judgment should not be disturbed because "the principles of *res judicata* bar the plaintiffs from relitigating in federal court precisely the same claims that they unsuccessfully asserted in prior litigation in the New York state courts." (Defendant's Brief, page 2)

We have found no rule or precedent to support defendant's practice. However, out of an abundance of caution, we take up the issue. Because defendant's statement of facts relative thereto contains a number of inaccuracies and omits material matter, we set forth our counterstatement. We note that defendant in its brief does not dispute the facts as stated in our Appellant's Brief through "The Appellate Division's Determination of the Appeal" at page 10. Our counterstatement now covers the events commencing with the appeal to the State Court of Appeals.

Counterstatement of Facts Relating to the Defense of *Res Judicata*

The Appeal to the State Court of Appeals

On October 18, 1973, plaintiffs appealed as of right to the New York Court of Appeals from the order modifying the determination of Chimera, J. Plaintiffs also brought up for review the order of the Appellate Division which affirmed the order of Murtagh, J. Because of the construction of the statute by the Appellate Division, plaintiffs in their notice of appeal gave notice that they will assert that the statute, as construed by the Appellate Division, is unconstitutional (148a). This was the first time the constitu-

tional claim was made. Plaintiffs filed their Record on Appeal and their Appellants' Brief.

Deferdant moved to dismiss the appeal on the ground that the modification order was a "non-final" order and, therefore, non-appealable as of right under the New York State Constitution; and that the "final" order in the proceeding was the order of Murtagh, J., which also was non-appealable as of right because it had been affirmed unanimously (150a).

Plaintiffs took issue with both contentions. In addition, plaintiffs urged the Court to retain the appeal because of the constitutional question raised by the Appellate Division's construction of BCL §623. (Record: Plaintiffs' exhibit, pp. 175-186)

On February 15, 1974, the New York Court of Appeals granted defendant's motion and dismissed the appeal "upon the ground that the order appealed from does not finally determine the proceeding within the meaning" of the New York State Constitution (151a). The Court did not consider the constitutional question.

Plaintiffs Return to the Appellate Division

Because the State Court of Appeals had ruled that plaintiffs could not appeal to it as of right, it became necessary to return to the Appellate Division with an application for permission to appeal, pursuant to CPLR §5514(a). Plaintiffs did so. They moved for an order granting (a) reconsideration of the decisions of September 20, 1973, and if the decisions remain unchanged, then (b) permission to appeal to the Court of Appeals (152a). Plaintiffs urged as a

ground for reconsideration that the statute, as interpreted by it, is unconstitutional (156a).

On March 21, 1974, the Appellate Division refused to reconsider its decisions and refused permission to appeal to the Court of Appeals (175a).

At page 9 of its brief, defendant states that the plaintiffs "did not succeed in securing a hearing on the merits of their constitutional claim until February 22, 1974, when they moved the Appellate Division to reconsider its orders of September 20, 1973 * * *." The defendant is in error. Plaintiffs never received a hearing on the merits of their constitutional claim. The order of the Appellate Division needs no clarification. It denied reconsideration and denied permission to appeal. (Record: Plaintiffs' exhibit, pages 271-272)

Plaintiffs Return to the State Court of Appeals

Plaintiffs then moved in the New York Court of Appeals for permission to appeal "on the ground that questions of law are presented which merit review" by that court (170a-171a). In support of the motion, plaintiffs urged that the language of the statute does not support the interpretation of the Appellate Division. Plaintiffs also urged that if that interpretation is permitted to stand, then the statute automatically deprives dissenting shareholders of their rights by the corporation's unilateral act of abandoning the merger during the pendency of the judicial proceeding (175a-176a).

The New York Court of Appeals denied plaintiffs' application for permission to appeal. It did not rule on the constitutional question (177a).

At pages 10 and 21 of its brief, defendant asserts that plaintiffs had noted that the Appellate Division "presumably" had rejected the constitutional issue in denying leave to appeal. Defendant takes the word out of context. Defendant misstates the fact. In plaintiffs' brief in support of their motion in the State Court of Appeals for leave to appeal, the two questions of law which they sought to have the court review are: (a) whether the Appellate Division's construction of the statute was correct when it held that upon abandonment of the merger, the statute precludes granting relief to dissenting shareholders, and (b) whether the statute, as construed by the Appellate Division, is constitutional (Record: Plaintiffs' exhibit, pp. 274-275). The moving party's brief, by way of introduction, must set forth how each question was dealt with in the lower courts (CPLR 5528). Plaintiffs stated that the Special Term did not have the constitutional issue before it, that the Appellate Division created the issue by its construction of the statute, that this issue was called to the attention of the Appellate Division on plaintiffs' motion for reconsideration and that that court presumably answered the question in the negative when it denied plaintiffs' motion. However, this statement is explained in paragraphs 8-11 of the moving affidavit where plaintiffs specifically showed that the Appellate Division did not entertain the issue (174a, Record: Plaintiffs' exhibit, pp. 271-272). This made it clear that the Appellate Division had not ruled on the constitutional issue on the merits.

If that were not enough, we have but to refer to paragraph 12 of defendant's affidavit submitted in opposition to plaintiffs' motion. There defendant states that as it reads "the brief submitted in support of the Goldbergs' motion, they urge two new grounds for consideration of the case by

the Court of Appeals: (i) First, they say that, as construed by the courts below, Business Corporation Law §623 deprives them of due process and is, therefore, unconstitutional; and * * *." (Record: Plaintiffs' exhibit, page 308) Thus, defendant acknowledged that the constitutional issue was new and had not been entertained by the lower courts.

Neither the Appellate Division nor the State Court of Appeals ruled on the constitutional issue. Plaintiffs could not and did not seek review by appeal or application for certiorari to the United States Supreme Court.

ARGUMENT

A.

The determinations in the State Court proceeding do not bar the action commenced in the United States District Court.

At page 17 of its brief, defendant states that plaintiffs did not deny before the District Court that their claim "in the federal court is identical in substance to that alleged in their earlier state action." Defendant is in error.

What Was Involved in the State Court Is Not Involved in the Federal Court

The judicial proceeding in the State court was but one step in the State's statutory scheme for regulation of corporate mergers. It is the defendant who had set in motion the rigid statutory scheme when it proposed and had its shareholders, other than plaintiffs, approve the merger. When plaintiffs elected to dissent, they ceased "to have any of the rights of a shareholder". In lieu thereof, the

statute gave plaintiffs a monetary claim or right to be paid the value of their shares as of the day prior to the shareholders meeting [BCL §623(e)].

However, to preserve such monetary claim or right, plaintiffs were required to comply with all procedural requirements of BCL §623. Plaintiffs did comply. When defendant failed to commence the judicial proceeding in the State Supreme Court, plaintiffs were compelled to do so. Had plaintiffs neglected to commence the proceeding, they would have lost their rights. And defendant would have proceeded with consummation of the merger without paying plaintiffs. (Brief of Plaintiffs-Appellants, p. 16)

Plaintiffs sought to move ahead with the proceeding. It was the defendant who sought to have it held in abeyance because of its loan negotiations. The State Supreme Court (Murtagh, J.) did precisely what the defendant requested and did not allow plaintiffs to move forward. No constitutional question was presented and none was determined.

On month later, the defendant notified plaintiffs that it had abandoned the merger. Plaintiffs then brought on their application for alternative additional relief. This was still pursuant to the statute and in the pending proceeding. Plaintiffs claimed that they were entitled to damages, interest, costs and expenses, including attorneys fees. They made the application pursuant to the specific provisions of the statute which referred to the scope and nature of the court's jurisdiction as "plenary and exclusive" [BCL §623 (f)(3)].

The State Supreme Court (Chimera, J.) determined that plaintiffs were entitled to counsel fees, but denied the balance of the application. No constitutional question was presented and none was determined.

On the appeals to the Appellate Division from the determinations of Murtagh, J. and Chimera, J., no constitutional question was presented and none was determined. The Appellate Division simply held that the statute made no provision for the relief requested by plaintiffs under the circumstances of an abandonment of corporate action. It accordingly determined that plaintiffs' application for relief had to be denied (145a-147a).

On plaintiffs' subsequent application to the Appellate Division for reconsideration or for leave to appeal to the State Court of Appeals, plaintiffs urged that the Court had the power under the statute to grant the relief pursuant to §623(h)(3); and that the Court should reconsider its interpretation, because such interpretation resulted in a deprivation of property, in violation of plaintiffs' constitutional rights. The Court refused reconsideration and leave to appeal. It did not pass upon the constitutional question (175a, Record: Plaintiffs' exhibit, pages 271-272).

Similarly, the State Court of Appeals, on both occasions, refused to entertain the appeal and did not pass on the constitutional question which plaintiffs sought to raise in order to show that the interpretation of the statute by the Appellate Division was incorrect (151a, 177a).

It was only after the State courts refused to entertain and rule upon the constitutional issue, that plaintiffs brought this action in the District Court.

In this action, plaintiffs' claims are not the same as they were in the State court. In this action, plaintiffs seek redress because, by virtue of the provisions of BCL §623, they were deprived of their rights and property in violation of the Fourteenth Amendment. This was not passed on by the State courts. The State courts held that under the

circumstance of an abandonment of a corporate merger, the statute makes no provision for any relief to a dissenting shareholder.

The Constitutional Issue Could Not Have Been Raised in the First Instance When the Statutory Judicial Proceeding Was Commenced in the State Court

We have demonstrated that no State court entertained and ruled upon the constitutional issue. Nevertheless, defendant argues that it could have been and, accordingly, *res judicata* is a bar. Defendant is in error.

Plaintiffs could not have anticipated that the defendant would abandon the merger during the judicial proceeding and that the Appellate Division would so construe the statute to deny them all relief. It was only after the Appellate Division had rendered its construction of the statute that the constitutional issue arose.

Indeed, plaintiffs were relying on the statute and complying with its requirements to protect their rights when they commenced the proceeding in the State court. In lieu of their status as shareholders, the statute made them monetary claimants for the value of their shares. They had to comply with the procedural requirements, one of which was to commence the judicial proceeding.

Lombard v. Board of Education *Also Is Dispositive of Defendant's* Res Judicata *Defense*

Defendant's contentions seeking to invoke the defense of *res judicata* are no different than those raised by the defendants in this Court in *Lombard* v. *Board of Education and Murphy*, 502 F.2d 631 (1974).

Lombard's probationary appointment as a teacher had been terminated. He thereafter commenced two Article 78

proceedings in the State Supreme Court to review such termination. In summarizing *Lombard's* position, this Court stated:

> "* * * It was thus Lombard's position in this state court proceeding, as it is here, that the charges made by Murphy and the unsatisfactory rating issued by him caused the termination of Lombard's probationary appointment and that those charges and that rating were unjustified and without foundation." (At page 635 of 502 F.2d)

The State court had held that the hearing accorded *Lombard* was proper and that the determination made to terminate his services was not arbitrary or capricious.

> "Lombard did not specifically raise the Fourteenth Amendment constitutional issue in either of these two Article 78 proceedings, but the appellees argue that, nevertheless, the appellant should have raised them in those state proceedings, and that his failure to do so precludes him from raising them in this section 1983 action." (At page 635 of 502 F.2d)

In the case at bar, defendant argues also that the constitutional claim is barred because plaintiffs could have litigated it in the State action. (Defendant's Brief page 11) This argument was disposed of by noting that the tests of *res judicata* or claim preclusion are not to be applied mechanically but are intended only to apply to certain classes of issues. This Court further stated that "policy considerations should not permit the extension of the *res judicata* doctrine in this case to issues of procedural due process which are said to raise claims under 42 U.S.C. §1983."

"First, when the Civil Rights Act was authoritatively interpreted in *Monroe v. Pape,* 365 U.S. 167, 183 (1961), the Supreme Court said:

> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved.

To apply res judicata to a remedy which 'need not be first sought and refused' in the state court, and which actually was not sought would be to overrule the essence of *Monroe* v. *Pape* and *Lane* v. *Wilson,* 307 U.S. 268, 274 (1939)." (At page 635 of 502 F.2d)

In the case at bar, plaintiffs could not have commenced their BCL §623(h) proceeding in the federal court. Nor could they have sought from the federal court the statutory construction for which they had argued in the State court. Accordingly, the federal court will not compel plaintiffs to seek constitutional redress in the State court. It was so held in *Lombard*:

"Second, if a federal action under section 1983 is considered to be the *same* cause of action as the state action for purposes of claim preclusion then a plaintiff desiring to raise a state statutory construction issue or even a state constitutional issue would, and probably should, not be able to raise these points in the federal district court in the first instance. See *Reid* v. *Board of Educ.,* 453 F.2d 238 (2d Cir. 1971); *Coleman* v. *Ginsberg,* 428 F.2d 767 (2d Cir. 1970). Here, even if we would like to put all the issues in the same court, we are better off not to *compel* the plaintiff to seek redress in the state court or statutory construction in the federal court. See *McNeese* v. *Board of Educ.,* 373 U.S.

668 (1963). That is what we think choice of forum means in Civil Rights Act cases." (At pages 635-636)

At page 10 of its brief, defendant states that plaintiffs should have sought review in the United States Supreme Court. A similar contention was raised by the defendants in *Lombard.* This Court disposed of that contention as follows:

"* * * It seems clear enough that if the appellant actually failed to assert his constitutional claim in the state court he could not get a writ of certiorari from the nonconstitutional judgment of the state court. 28 U.S.C. §1257(3); Sup. Ct. Rule 19; *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Ellis* v. *Dixon,* 349 U.S. 458 (1955); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 162 (1932) ('failure to make seasonably the federal claim'). We prefer to treat the statement in *Frazier* as *obiter* so far as a *procedural* due process claim is concerned, since in *Frazier* there had been a 'full hearing' in the state court and procedural due process was not involved." (At page 636)

In *Lombard,* the problem was not viewed, strictly speaking, as a *res judicata* problem, but as a question of whether the appellant had "waived" his constitutional right. This, he had not done. This Court went on as follows:

"* * * Nor is the plaintiff required to make the attack in an Article 78 proceeding in the state court, for section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process. *McNeese* v. *Board of Educ., supra.* * * *" (At page 636 of 502 F.2d)

So, too, in the case at bar, plaintiffs did not make the constitutional attack in the State court in the special statutory proceeding instituted by them. When they sought to raise the constitutional question in seeking reconsideration and permission to appeal, their applications were denied, so that no State court heard and decided the constitutional issue.

Had the Appellate Division granted reconsideration or leave to appeal or had the Court of Appeals granted leave to appeal, thus permitting the constitutional issue to be raised in the State court proceeding, then the defendant's contention would have merit:

> "Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment, *Matter of Kovarsky* v. *Housing & Development Administration,* 31 N.Y.2d 184 (1972), the litigant has made his choice and may not have two bites at the cherry." (At pages 636-637 of 502 F.2d)

This Court in *Lombard* also stated that for the doctrine of issue preclusion to be applicable, the determination of the issue must have been *necessary* to the decision (at page 637). It is clear that the determination of the constitutional issue was not *necessary* for the decision of the Appellate Division in refusing reconsideration and permission to appeal and equally not *necessary* for the decision of the State Court of Appeals in refusing permission to appeal. Similarly, the determination of the constitutional issue was not necessary for the original decision by the Appellate Division and the decisions of Murtagh, J. and Chimera, J. at Special Term.

Paraphrasing this Court in *Lombard,* it is not consistent with *Monroe* v. *Pape* to put plaintiffs in a position where they cannot raise the constitutional question, and it is not consistent with constitutional due process to deny relief to plaintiffs without an evidentiary type of hearing.

Defendant concludes its *res judicata* argument with the statement that plaintiffs' claim in the case at bar is different from that claimed by *Lombard* and that "Far from depriving the Goldbergs of any rights without notice or hearing, the scheme of BCL §623 afforded them a plenary hearing in an action that they themselves initiated." Defendant again is in error. BCL §623 automatically deprived plaintiffs of a plenary hearing when defendant abandoned the corporate merger during the pendency of the proceeding!

BCL §623 was the sole and exclusive remedy to be pursued by plaintiffs. This they did. However, when the defendant unilaterally abandoned the merger, the statute afforded plaintiffs no relief. Instead, the statute deprived them of their rights and property, without due process. The pending action is supplemental to the State court proceeding which they had been compelled to commence and which was automatically terminated by the unilateral act of abandonment. The pending action is to obtain redress for plaintiffs' rights and property, of which they were deprived by virtue of the statute.

B.

Defendant did act under color of State law.

In its Point I, defendant argues at page 10 *et seq.* that it did not act under color of State law and, accordingly, the District Court properly dismissed the complaint for failure to state a claim against defendant under 42 U.S.C. §1983.

The defendant is in error. Had it not been for the statute, no such merger or change of state of incorporation from New York to Delaware can be accomplished without unanimous shareholder approval. Had it not been for BCL §903, defendant could not have inserted in its corporate merger plan the provision for abandonment (195a). Had it not been for BCL §623(e), defendant could not and would not have abandoned the corporate merger during the judicial proceeding when the shares had declined in value, with the resultant loss and damage to plaintiffs, for which the statute says defendant has no liability to plaintiffs.

The defendant did act under color of State law, because BCL §623(e) permitted it to abandon the corporate merger. It is the State court which construed the statute and denied all relief to plaintiffs for damages and loss sustained. It denied them a forum in which to present their claims and be heard.

Defendant's position is entirely different from that of a creditor or seller as in: *Shirley* v. *State National Bank of Connecticut,* 493 F.2d 739 (2nd Cir. 1974); *Bond* v. *Dentzer,* 494 F.2d 302 (2nd Cir. 1974); *Gibbs* v. *Titelman,* 502 F.2d 1107 (3rd Cir. 1974); and *James* v. *Pinnex,* 495 F.2d 206 (5th Cir. 1974). There, the creditor or seller asserted a

right which his private agreement gave him. It was either the right of peaceful repossession (*Shirley, Gibbs* and *James*) or the right of filing a wage assignment with the debtor's employer (*Bond*). In these cases there was not sufficient state action to bring the Fourteenth Amendment into play. At most, the states recognized, i.e., by codification, the private arrangement.

So, too, in *Jackson* v. *Metropolitan Edison Co.*, —— U.S. ——, 42 L.Ed.2d 477 (1974), the Supreme Court held that Pennsylvania was not sufficiently involved or connected with the private utility company's termination of service to make such conduct that of the State for the purposes of the Fourteenth Amendment.

Defendant can point to no private agreement or arrangement with plaintiffs which permitted it to act other than by virtue of the statute. Instead, it argues at page 15 that unlike the utility company in *Jackson,* defendant is "not subject to a pervasive regulative scheme of the sort that governs electric companies; rather, New York's involvement in *Arrow's* activities differs not at all from the State's role in the affairs of any profit-making corporation that it charters." Again defendant is in error.

What we are particularly concerned with is the State's involvement with a corporate merger. It is the State which made possible a corporate merger by enacting the "statutory scheme." It provided for the rigid procedural requirements to be complied with by a dissenting shareholder. It also provided for the abandonment of the corporate merger. Defendant could not and would not have acted except by virtue of the statute.

Defendant states toward the end of page 15 of its brief that "it is not the defendant who sought the benefit of the statutory scheme about which plaintiffs now complain, but plaintiffs themselves who chose to dissent and then elected to bring suit to enforce their dissenters' rights." Again the defendant is in error. It is the defendant who sought the benefit of the statutory scheme. It is the defendant who invoked its provisions by giving the requisite notice (5a, 16a). The commencement of the judicial proceeding was necessitated by reason of the failure of the defendant to commence such proceeding.

Defendant at page 14 of its brief states that this Court "has limited the *Reitman* decision to circumstances involving racial discrimination." Defendant is in error. We have found no such limitation in the cases examined. What this Court stated is that state action is much more likely to be found where racial discrimination is involved. In *Coleman* v. *Wagner College,* 429 F.2d 1120 (2nd Cir. 1970), Judge Friendly stated that "racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." See also *United States* v. *Wiseman,* 445 F.2d 792 (1971) at page 795, Note 3.

Furthermore, the distinction between property rights and personal rights in actions challenging the constitutionality of state action was rejected in *Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972).

Defendant relies on *Parks* v. *Ford,* an unreported 32-page opinion of Fogel, J. in the Eastern District Court of Pennsylvania (Defendant's Brief, page 13 *et seq.*). It involves the liens of repairmen. Suffice it to say that the

District Judge reached a conclusion which is opposite that reached by this Court in *Hernandez* v. *European Auto Collision,* 487 F.2d 378 (1973).

We conclude this point with the observation that defendant's incorporation and plaintiffs' stock ownership in defendant predate the 1950 enactment of the abandonment provision (68a, 73a).

C.

BCL §623(e) relating to abandonment is unconstitutional.

Under its point III(a), defendant seeks to distinguish the cases upon which plaintiffs rely by claiming that they involve "deprivations of property as a consequence of acts initiated by someone other than the complaining party." Defendant further states that "plaintiffs challenge the validity of a statutory scheme that they themselves voluntarily invoked to obtain a benefit—the right to an appraisal—not available to shareholders at common law (Defendant's Brief, page 24). Defendant is in error.

Plaintiffs did not initiate the merger. Plaintiffs "did not themselves voluntarily invoke" the statutory scheme. Rather, it is the defendant who initiated the merger and the procedures under BCL §623. It is the defendant who invoked the statutory scheme to obtain a benefit not available to it under the common law—to merge with its newly created, wholly owned Delaware shell corporation so that it would no longer be subject to New York laws. Plaintiffs, as dissenting shareholders, gave up their status as shareholders and became monetary claimants for the value of their shares. When defendant failed to commence the judicial proceeding, plaintiffs were compelled to do so. Had

they failed to do so, they would have lost their right to receive the fair value of their shares. Plaintiffs' commencement of the proceeding was but one step in the statutory scheme invoked by defendant.

Also, at page 24 of its brief, defendant argues that the statute which plaintiffs attack "not only afford dissenting shareholders an adversary hearing" but provides "for judicial control of the process from beginning to end. *Mitchell* v. *W. T. Grant Co., supra.*" This is so, provided there has been no abandonment of the corporate merger. It is not so, when the corporation abandons the merger. Upon abandonment, the adversary judicial proceeding terminates, and the statute makes no provision for any relief to the dissenting shareholders. The judicial control ends with the abandonment.

Arnett v. *Kennedy,* 416 U.S. 134 (1974) and *Kovarsky* v. *Housing & Development Administration,* 31 N.Y.2d 184 (1972), upon which defendant relies, are not applicable. In each of these cases, the statute granted rights to the employee, *Arnett,* and to the tenant, *Kovarsky,* subject to conditional limitations.

In the case at bar, the reverse is the fact. On the one hand, the statute deprives a non-assenting shareholder of the right to remain a shareholder in a New York corporation, and it deprives him of the right to prevent its merger into a Delaware corporation. On the other hand, the statute gives the corporation the right to merge and thus change the state of its incorporation, which it did not have under the common law. The non-assenting shareholder under the statute is deprived of his status as a shareholder and he is to receive the value of his shares provided he complies with the precise procedural requirements of the statute.

Contrary to defendant's statement at page 27 of its brief, plaintiffs did not invoke BCL §623; they did not seek its benefits. As non-assenting shareholders, they were compelled to comply with the procedural requirements of the statute which defendant had invoked. When defendant failed to commence the judicial proceeding, plaintiffs did, to preserve their rights under the statute.

At pages 27 and 28 of its brief, defendant argues that the statute deprived plaintiffs of no substantive right because upon abandonment the dissenter is reinstated to all his rights as a shareholder. Defendant refuses to face the facts and meet the issue. Reinstatement to shareholder status does not restore the dissenters to the position they were in eight months earlier. Their shares have declined in value. They were put to the expense of commencing a judicial proceeding. The statute, as construed by the State court, terminated their proceeding and denied them all relief.

It is no proper answer to say that the dissenter may withdraw his dissent if the corporation consents. The corporation's consent would be withheld if there was a rise in the price or value of the shares. The corporate game would still prevail. "Heads I win, tails you lose."

Similarly, it is no proper answer to say that the dissenter may transfer his shares to others. The transferee is subject to the statutory legend endorsed on the certificate and he, too, is subject to defendant's corporate game!

CONCLUSION

The judgment of the District Court should be reversed and the complaint reinstated.

March 14, 1975

Respectfully submitted,

SAMUEL M. SPRAFKIN
Attorney for Plaintiffs-Appellants

SAMUEL M. SPRAFKIN
MANDEL M. EINHORN
of Counsel

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

MAURICE GOLDBERG, et al., :

Plaintiffs-Appellants, :

-against- : AFFIDAVIT OF SERVICE

ARROW ELECTRONICS, INC., :

Defendant-Appellee, :
etc.

:

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RITA SPINNER, being duly sworn, deposes and says: I am not a party to the action. I am over twenty-one years of age. I reside in Brooklyn, New York. On March 14, 1975 I served the within Reply Brief of Plaintiffs-Appellants upon NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SOLL, ESQS., attorneys for Defendant-Appellee in this action, at 919 Third Avenue, New York, N.Y. 10022, which is the address designated by them for that purpose, by depositing two true copies, enclosed in a postpaid, properly addressed envelope, in the official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Rita Spinner

Sworn to before me this
14th day of March, 1975.

Mandel M. Einhorn

MANDEL M. EINHORN
Notary Public, State of New York
No. 31-6163685
Qualified in New York County
Commission Expires March 30, 1976

Proof of Service
Inside back
cover

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775